

D.P.U. 91-DS-31

Adjudicatory hearing in the matter of a possible violation of G.L. Chapter 82, Section 40, by C.J.P. & Sons Construction Co., Inc., Millis, MA.

APPEARANCES: Cesidio J. Pinciaro, Sr.
 President
 C.J.P. & Sons Construction Co., Inc
 1420 Main Street
 Millis, MA 02054
 FOR: C.J.P. & Sons Construction Co., Inc.

I. INTRODUCTION

On September 16, 1991, the Pipeline Safety and Engineering Division ("Division") of the Department of Public Utilities ("Department") sent C.J.P & Sons Construction Co., Inc. ("Respondent") a Notice of Probable Violation ("NOPV"), which stated that the Division had reason to believe that the Respondent performed excavations on June 24, 1991, on Spring Street, Rockland, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to properly maintain the markings, and failed to exercise reasonable precautions causing damage to the underground service line operated by Boston Gas Company ("Company"). The NOPV stated that the Respondent has the right to either appear before a Department hearing officer in an informal conference on August 28, 1991, or send a written reply to the Department by that date.

On August 12, 1991, the Respondent replied by letter, stating that it obtained a valid Dig-Safe number and that it exercised all reasonable precautions. In a letter dated September 16, 1991, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and informed the Respondent of his right to request an adjudicatory hearing.

On September 24, 1991, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). After due notice, an adjudicatory hearing was held on March 30, 1992. Mario Reid, a compliance officer with the Division, represented the Division. Cesidio J. Pinciario, Sr., president of C.J.P. & Sons Construction Co., Inc., testified for the Respondent. The evidentiary record consists of six exhibits.

II. SUMMARY OF FACTS

A. The Division

The Division alleged that the Respondent failed to maintain the marks placed by the Company and failed to use reasonable precautions while excavating on 198 Spring Street in Rockland, which resulted in damage to a two-inch plastic main (Tr. at 4, 10-11; Exh. PES-1). The Division indicated that the marking on the street was removed when the street surface was removed, and no recall was made by the Respondent to replace the marks that were removed (Tr. at 11; Exh. PES-1). The Division further indicated that the Respondent caused the damage by using a shovel dozer (id.).

B. The Respondent

Mr. Pinciario testified that the Respondent was doing sewer excavations with a backhoe on Spring Street in Rockland (Tr. at 19). In order to do the excavations, the Respondent testified that it takes the asphalt off the street, then removes the dirt and finds the plastic pipe by hand (id. at 15,16). A bar or shovel is then placed in front of the utility and the area underneath is excavated (id. at 16).

In this case, the Respondent stated that it followed the above procedure, found a steel pipe and assumed it was the gas pipe since in the previous service hook-ups on that street, the gas pipe was steel (id. at 17). It placed a shovel in front of the steel pipe, began to excavate in front of the pipe and pulled up the plastic gas pipe (id.). Mr. Pinciario also stated that only the steel pipe was marked and estimated the distance between the markings and the plastic gas main to be two feet (id. at 35, 36). Mr. Pinciario further stated that the Respondent took every precaution to find the gas pipe, and had every reason to believe that it had located the gas pipe when it found the gas pipe, when it found the steel pipe (id. at 17, 26).

III. STANDARD OF REVIEW

G.L. c. 82, § 40 states in pertinent part:

After a company has designated the location of such pipes ..., the excavator shall be responsible for maintaining the designation markings ... unless the said excavator requests re-marking at the locus due to the obliteration ... of such markings and the company shall then have twenty-four hours following the receipt of such request to re-mark such locus.

The language of the statute is clear and the Department has consistently found that the excavator is responsible for maintaining utility designation markings. Linden Construction Co., D.P.U. 87-DS-149 (1991). The failure to maintain designation markings will be considered a violation of the Dig Safe law. Warner Bros., Inc., D.P.U. 87-DS-124 (1990).

G.L. c. 82, § 40 also states in pertinent part:

Any such excavation shall be performed in such manner, and such reasonable precautions taken to avoid damage to pipes, mains, wires or conduits in use under the surface of said public way ... including, but not limited to any substantial weakening of structural or lateral support of such pipe, main, wire, or conduit, penetration or destruction of any pipe, main, wire or the protective coating thereof, or the severance of any pipe, main or conduit.

"Reasonable precautions" is not defined in the statute or the Department's regulations, nor do regulations specify approved conduct. Instead, case precedent has guided the Department in this area. Several recent cases have established the proposition that using a machine to expose facilities, rather than hand-digging, constitutes failure to exercise reasonable precautions. See Cairns & Sons, Inc., D.P.U. 89-DS-15 (1990); Petricca Construction Company, D.P.U. 88-DS-31 (1990); John Mahoney Construction Co., D.P.U. 88-DS-45 (1990); Northern Foundations, Inc., D.P.U. 87-DS-54 (1990). However, in Fed. Corp., hand-digging to locate facilities was found to be impossible, and use of a Gradall was found to be reasonable when the Division failed to set

forth a reasonable alternative the excavator could have taken to avoid damage. Fed. Corp., D.P.U. 91-DS-2 (1992).

A variation in depth does not relieve an excavator from its duty to use reasonable precautions. Fed. Corp., *supra*; Amorello, D.P.U. 89-DS-61 (1990). However, the depth of an underground facility may be relevant in certain cases when the depth may have limited the precautions an excavator could have taken to protect underground facilities. Amorello & Sons, D.P.U. 87-DS-148, at 7-8 (1993); New England Excavating, D.P.U. 89-DS-116, at 6-7 (1993).

In order for the Department to justly construct a case against an alleged violator of the Dig-Safe Law for a failure to exercise reasonable precaution, adequate support or evidence must accompany that allegation. New England Excavating, *supra*, at 9; Fed. Corp., *supra*, at 5-6. In specific instances where there has been an allegation of a failure to exercise reasonable precaution without demonstrations of precautions that the excavator could or should have taken, the Department has found that the mere fact of damage will not be sufficient to constitute a violation of the statute. Umbro & Sons, D.P.U. 91-DS-4 (1992); Fed. Corp., *supra*; Albanese Brothers, Inc., D.P.U. 88-DS-7 (1990).

III. ANALYSIS AND FINDINGS

The issues to be decided in this case are whether the excavator failed to maintain the utility designation markings and whether the Respondent exercised reasonable precaution while excavating at the site.

In addressing the issue of whether the Respondent failed to maintain the markings, the only evidence presented by the Division was that after the excavation, there were no visible markings. The Division did not offer testimony from the Company regarding whether the

markings existed prior to excavation. The Respondent testified that when doing house connections, the road surface is removed and the pipe is immediately found, and therefore, no flags need to be placed where the markings were once located (Tr. at 22). The Division's evidence does not demonstrate that the Boston Gas markings had been lost or obliterated before excavation began which would have required a request for remarking by the Respondent. Therefore, the Department finds that the Respondent did not fail to maintain proper Dig Safe markings.

On the issue of reasonable precaution, the Division did not adequately demonstrate that the Respondent failed to exercise reasonable precaution when excavating. The Respondent testified that only the steel gas main was marked and that the plastic gas main, which was damaged, was not marked. The Respondent also testified that the plastic gas main was located two feet from the markings for the steel gas main. Therefore, the Respondent damaged a plastic gas main that was not marked despite the fact that the Respondent had properly requested that Spring Street be marked. The Division did not controvert this testimony. Accordingly, the Department finds that the Respondent did not violate the Dig Safe law by failing to use reasonable precautions when excavating at 198 Spring Street in Rockland, Massachusetts.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That C.J.P. and Sons Construction Co., Inc., did not fail to exercise reasonable precaution and did not fail to maintain proper Dig Safe markings while excavating at 198 Spring Street in Rockland, Massachusetts, on June 24, 1991, and was not in violation of the Dig-Safe Law and it is

ORDERED: That the NOPV issued against the Respondent be and is hereby
DISMISSED.

By Order of the Department,

Kenneth Gordon, Chairman

Barbara Kates-Garnick, Commissioner

Mary Clark Webster, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).